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Supreme Court, U.S.
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No. 99-735

IN THE

Supreme Court of the United States

KURT D. SHIPLETT,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION d/b/a AMTRAK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent National Railroad Passenger Corporation, also known as Amtrak, has no corporate affiliates.

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STATEMENT OF THE CASE

National Railroad Passenger Corporation ("respondent" or "Amtrak") respectfully submits this brief in response to the petition of Kurt D. Shiplett ("petitioner" or "Shiplett"), which seeks review of the Sixth Circuit's unpublished order entered June 17, 1998 (the "Order"). The Sixth Circuit Order reversed a $500,000 judgment that had been entered in petitioner's favor based on a general verdict rendered by the jury concerning petitioner's claims under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq.* ("ADA"), the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 *et seq.*, the Michigan Handicappers' Civil Rights Act, MCLA 37.1101 *et seq.*, and the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), and directed entry of judgment for Amtrak on petitioner's claims. App. A-27.

First, the Sixth Circuit's decision does not "directly conflict" with this Court's decision under the ADA in *Bragdon v. Abbott*, 524 U.S. 624 (1998), as petitioner argues. Pet. 9-14. Quite the contrary, it is in harmony with both *Bragdon*, and another significant recent decision of this Court, which petitioner neglects to cite, *Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999). Similarly, the Sixth Circuit's decision does not conflict with the principle that an "individualized inquiry" should generally be undertaken to determine whether an ADA plaintiff poses a direct threat to health and safety. Pet. 14-18. That *general* principle has no application given the evidence and federal regulations applicable to *this* case. In any event, both of petitioner's "conflict" arguments ignore the Sixth Circuit's alternative holding that Shiplett's evidence failed to rebut Amtrak's non-pretextual justification for its actions, thus defeating his ADA claim even if he were "otherwise qualified" under ADA standards.

Equally meritless is petitioner's contention that there is "conflict" and "confusion" in the circuits regarding an employer's duty to reasonably accommodate that warrants review by this Court. Pet. 18-23. Petitioner's argument is premised on a misreading of the case law and, once again, on a failure to address the alternative ground upon which the Sixth Circuit properly rejected petitioner's "reasonable accommodation" claim.

Finally, neither the record in this case, the Sixth Circuit's Order, nor any other lower court decision justifies this Court's review of petitioner's claim that Amtrak negligently caused him to suffer emotional injuries cognizable under the FELA. Pet. 23-26. The Sixth Circuit's application of this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) was entirely appropriate.

Petitioner's arguments largely reflect his disagreement with the Sixth Circuit's conclusion that viewing the evidence in a light most favorable to petitioner, there is insufficient evidence to support elements of petitioner's ADA and FELA claims. App. A-11--26. There is no cause for this Court to review what basically amount to fact-bound arguments concerning the evidentiary record below.

The Full Factual Record.

Petitioner either ignores or quickly skips over indisputable evidence that demonstrates why the Sixth Circuit's Order is correct.

Petitioner Kurt D. Shiplett ("petitioner" or "Shiplett") was employed by Amtrak in 1994 as a locomotive engineer.

App. A-2 -- A-3; JA 437.[1] He served as an extra-board engineer, which meant he was on-call for duty, subject to federal regulations and collective bargaining agreement requirements governing time off between assignments. App. A-2 -- A-3; JA 573-574.

On September 15, 1994, while operating a passenger train, petitioner overshot the platform at not one but three station stops. The first two times he missed his "spot" at the station by one to one and one-half car lengths; the third time, he overran the Jackson station stop by the entire length of the train, about 600-700 feet. App. A-2; JA 91-92, 108-111, 621.

Petitioner's supervisor testified at trial that the Jackson overrun was "unusual" and "surprising," an event that caused him "concern" about Shiplett's health. JA 310.[2] Although Shiplett told the supervisor he was "tired" and had made a "misjudgment" (App. A-2; JA 307 487-488, 567-568), Shiplett would later admit that he had been off duty at least 24 hours before his shift began. JA 569-570.

Since he had violated Amtrak's operating rules, Shiplett was required to submit to a "reasonable suspicion" drug and alcohol screen. App. A-3; JA 490-492. He tested positive for benzodiazepine, a class of drugs that includes Xanax. App. A-3; JA 625. Although Shiplett had never before tested positive for any drug, the evidence at trial revealed that petitioner had obtained prescriptions for Xanax from various personal physicians over many years and had been taking Xanax

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[1] "JA" citations are to the joint appendix filed in the Sixth Circuit in connection with this appeal.

[2] The supervisor was later disciplined for letting Shiplett continue to operate the train after the Jackson overshoot. App. A-2; JA 93, 96, 303-305.

continuously since at least 1992 to alleviate, in his words, a "sleep disorder." JA 413, 444-445, 449-452, 459-461, 494, 574-580; *see* App. A-3 -- A-4.

There is no dispute that Xanax is a highly addictive, hypnotic drug. App. A-3; JA 407, 499, 625-626, 638, 645-647, 678, 707-708, 720. The potential side effects of Xanax include drowsiness, light-headedness and impaired memory and coordination. App. A-3. Xanax can be half-effective as long as 26 hours after ingestion, and the average duration of side effects is about 11.5 hours. App. A-3; JA 93, 96, 180-184, 410, 625-626, 643-648, 659.

The September 15, 1994 incident was reported the next day to Amtrak's medical director, Dr. Robert McLean, who was told Shiplett had been removed from service for an operating rule violation. App. A-4; JA 93, 96, 163-167, 491-493, 621-622. Dr. McLean was requested to determine whether the Xanax was in Shiplett's system "legitimately" and whether the drug might have caused Shiplett to miss three station stops. App. A-4; JA 623-624.

Dr. McLean spoke to Shiplett by telephone on September 19; petitioner told the medical director that he had felt extremely drowsy on the 15th and did not recall overshooting the train stations. App. A-4. Shiplett also told the medical director that he had noted he was on Xanax at his last Amtrak physical examination in 1992. App. A-4; JA 90-92, 113-115, 322-323, 622-623, 625, 627-630.[3] Dr. McLean's

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[3] An Amtrak file maintained in Detroit included a 1991 physical examination form reflecting that Shiplett was taking Xanax on or before June 1991 and had been warned by a doctor not to operate a motorized vehicle while taking the drug. App. A-3 -- A-4; JA 93-94, 143, 329-330, 447-448

office did not, however, have copies of any prior physical examinations of Shiplett; the medical director was unaware Shiplett was taking Xanax and would *not* have authorized Shiplett's use of the drug. App. A-5; 627-628. In point of fact, the evidence showed that Shiplett had been prescribed Xanax in 1992 at a dosage of .25 milligrams at bedtime, and by 1994 his daily prescribed dosage was up to 1.0 milligrams, a four-fold increase. App. A-3 -- A-4.

According to Shiplett, he also spoke to Dr. McLean around September 20, 1994, at which time the medical director supposedly told him to stop taking Xanax immediately. App. A-4; JA 494-496. Dr. McLean flatly denied giving such advice and his notes reflect that he told Shiplett to see his personal physician, because the drug needed to be withdrawn gradually over a two to three week period. JA 93, 97, 189-211, 649-651; *see* A-4. Shiplett never denied being told by Dr. McLean to contact his personal physician, Dr. May, immediately. JA 408, 597-598. According to Shiplett, he immediately stopped taking Xanax and suffered headaches, shakiness, insomnia and nausea. App. A-4.

After speaking to Shiplett, Dr. McLean called petitioner's personal physician, Dr. May, who confirmed that he had prescribed Xanax to Shiplett and that the petitioner had told the doctor he worked as a railroad engineer. App. A-5; JA 93, 121, 584, 631-632, 634-635.

Based on the information gathered, Dr. McLean decided that Shiplett "should not be held to account for having this drug ... in his system," and treated the September 15 drug result as though it were a negative test result. JA 634-635; *see,* App. A-5. As a result, Shiplett was not obligated either to give a clean urine sample within 30 days or to enter an Employee Assistance

Program as normally would be required under company policy. App. A-5 -- A-6.

Amtrak's medical director also determined, however, that Xanax could have contributed, alone or in combination with other factors, to Shiplett's "significant operational error." App. A-6; JA 635-637, 642. Dr. McLean testified that he was unwilling to take the chance that petitioner might be operating a train while under the influence of Xanax, and thus he temporarily disqualified petitioner from working as a locomotive engineer. App. A-6; JA 633, 642-643, 649. On September 22, 1994, the medical director issued a directive that Shiplett "may not operate further as a Locomotive Engineer while taking Xanax" and directed that Shiplett be scheduled for a fitness for duty examination. JA 93-94, 134, 642-644, 652, 717; *see*, App. A-6. In connection with the fitness exam, the medical director asked that "the examiner ... rule out some unknown medical problem that may have contributed to his ... operating rule violations." JA 93-94, 134.

At trial, Dr. McLean stressed, and petitioner conceded, that locomotive engineer is a safety-sensitive position, requiring someone who is extremely alert and capable of coping with work pressures, including schedule deadlines and emergencies. JA 93, 97, 186-188, 564-565, 617-620. The engineer is responsible for passengers being transported at substantial speeds in equipment weighing many hundreds of tons, and thus Shiplett's actions on September 15, according to Amtrak's medical director, represented both a "rare occurrence" and a "significant problem." JA 617-620, 623-624, 705. In making his decision on how to proceed, Dr. McLean testified that he would "not take chances with our passengers." JA 642-643.

Shiplett was examined on September 29 by an independent medical doctor, Dr. Gallant. Although Dr. Gallant

found Shiplett mentally and physically fit to return to work (App. A-6), his report stated that he specifically discussed with petitioner the addictive properties of Xanax and "recommended to him that he refrain from ever taking this medication." App. A-5; JA 93, 127-128, 652-655. Dr. Gallant's report also noted that Shiplett had told him that he had initially discontinued taking Xanax, but that "two days ago he took a half of a tablet because he could not sleep." JA 93, 127-128; *see also*, JA 496-497, 582-583.

On September 30, Dr. McLean cleared Shiplett to return to work as a locomotive engineer so long as Shiplett was not taking Xanax, or other medication with similar side effects, and so long as Shiplett reported to his supervisor whenever he considered himself incapable of working due to drowsiness. App. A-6; JA 93, 95, 157.

Beginning in early October 1994, Shiplett came under the care of a new personal physician, Dr. Matossian. He presented to Dr. Matossian with severe panic attacks and depression. According to Shiplett, he was taking Xanax at the time, using Dr. May's prescription. Petitioner's new doctor prescribed a variety of other drugs to treat Shiplett's medical condition and enable him to return to work. JA 93-94, 137, 381, 399-402, 409, 581-582, 584, 587-588, 590.

On November 9, Dr. Matossian orally reported to Dr. McLean that petitioner was doing well on a new regimen of drugs, which did not include Xanax. All of those drugs were "highly acceptable" to the medical director. Dr. Matossian reported that Shiplett was "sleeping very well," leading Dr. McLean to testify at trial that "it appeared we had a very favorable result." JA 93, 97, 402-403, 670-671, 673.

Shiplett's doctor then provided a written report to Dr. McLean, dated November 11, 1994, which set forth petitioner's new regimen of medications and pronounced Shiplett fit to resume all previous activities. App. A-6; JA 93, 123-125, 402-403, 672. Dr. Matossian's report concluded that petitioner "has been successfully treated and is feeling better than ever." JA 93, 123-125. By memorandum dated November 14, 1994, Dr. McLean promptly determined that Shiplett could "return to work without restrictions." App. A-6; JA 93, 122, 673-674.

In accordance with the terms of the collective bargaining agreement between Amtrak and the Brotherhood of Locomotive Engineers, Amtrak then arranged a return to work physical for Shiplett, which, as petitioner well knew, would include a urinalysis. App. A-6 -- A-7; JA 585-586, 589-590, 674-675. Yet, when Shiplett was given the return-to-work exam on November 23, his urine tested positive for Xanax. App. A-7. Petitioner would later claim that he had mistakenly neglected to take his new medications when he went on vacation and, three days before the exam, he took some Xanax that he "happened" to have with him on the trip. App. A-7; JA 404, 510-512, 586-588, 675-679.

Under Amtrak's policy and the terms of its union labor agreement, the fact that Shiplett failed this drug test meant he now had the option of taking a retest and providing a negative urine sample within 30 days of the positive result, or, alternatively, entering a company-provided Employee Assistance Program ("EAP") within 30 days. App. A-7.

By letter dated November 29, 1994, Amtrak formally notified Shiplett of the positive test result and described his two options under Amtrak's policy. App. A-7; JA 93, 126, 679-681. Dr. McLean also called Dr. Matossian in early December to discuss Shiplett's options, adding that he would see if

Amtrak could do something to help "maintain the doctor/patient relationship with Dr. Matossian." App. A-7; JA 682-684.

Shiplett never responded to Amtrak's November 29, 1994 drug notification letter. In accordance with the applicable labor agreements, Amtrak then sent petitioner a notice letter dated January 5, 1995 advising that it had instituted an investigation and would conduct a hearing on Shiplett's violation of Amtrak's rules based on his failure to respond to Amtrak's November 29 notification letter. App. A-7; JA 93, 95-96, 158-159, 163-167, 168-179, 685-690, 711-712.

Shortly before Amtrak's notice of investigation letter was issued, Dr. Matossian sent Amtrak a December 23, 1994 letter, which advised that Shiplett "is ... off work indefinitely." App. A-7; JA 120, 595, 685-686, 690.[4] Although Dr. Matossian's letter did not affect the January 5, 1995 charges, Dr. McLean then recommended indefinite postponement of any hearing. Dr. McLean arranged for a waiver of the company drug policy so that Shiplett could obtain treatment from Dr. Matossian, rather than treatment under the oversight of the EAP, so long as upon completing the doctor's program, Shiplett could, among other things, test negatively for drugs, including benzodiazepines. JA 93-94, 135-136, 595-596, 687-697. Dr. McLean memorialized this new option in January 26, 1995 letters to Dr. Matossian and to Shiplett. App. A-8; JA 93-94, 132-133, 135-136, 404-405, 554-559, 694-697, 700-701. Petitioner did nothing to avail himself of this new option. App. A-8; JA 700.

In early 1995, Shiplett applied to the Railroad Retirement Board ("RRB") for disability benefits. App. A-8;

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[4] At trial, petitioner would admit he was completely disabled as of December 23, 1994. JA - 520.

JA 93-94, 145-154, 537-538. Petitioner's application, which was supported by a report from Dr. Matossian, certified that Shiplett had been suffering since March 15, 1991 from a "lower back injury, gastrointestinal problems, Epstein-Barr virus, uncontrollable mood swings, psychological disorders, inability to concentrate, confusion, depression, severe mood swings, homicidal/suicidal tendencies, forgetful" and that Shiplett had been suffering from May 1991 to September 1994 from "fatigue, confused, insomnia, fear of losing control of oneself/crazy, lack of concentration, panic attacks."[5] On his application, Shiplett also represented that because of his condition, he had been unable to work since September 15, 1994, the date he overshot the station and tested positive for Xanax, that his condition prevented him from working due to his violent tendencies, lack of concentration, forgetfulness, panic attacks, fatigue, and "mood swinging," and that he found it hard, among other things, to drive a motor vehicle or sit. JA 93-94, 145-154, 419-420, 426-429, 524, 538-547.[6] Shiplett was awarded monthly disability retirement benefits from the RRB; Amtrak then transferred petitioner to a disability retirement status, all effective as of September 15, 1994. App. A-8; JA 93-95, 144, 145-154, 155, 156, 549, 550-552, 553, 703-704.

On April 6, 1995, Amtrak sent a formal letter offering Shiplett the opportunity to request a reasonable accommodation, stating, in part:

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[5] Shiplett's long history of medical difficulties was also acknowledged during the trial testimony of petitioner's two medical experts. JA 369, 376-377, 413-422.

[6] The application correctly acknowledged that Shiplett had *not* been medically disqualified from work by his employer. App. A-8; JA 93-94, 145-154, 545.

> In order to evaluate your condition and thereby determine your need for reasonable accommodation, it will be necessary for your physician to provide medical documentation of your disability to Amtrak's Medical Director, Dr. Robert McLean, for review.... The information forwarded to Dr. McLean shall identify any restrictions or limitations to your activities....

App. A-8; JA 93, 97, 185, 562-564, 698-700. Shiplett did not respond to this offer. App. A-8 -- A-9; JA 563-564, 700, 702. Shiplett also never completed a "Request for Reasonable Accommodation" form. JA 93, 97, 254, 564.

McLean spoke with petitioner again on July 11, 1995, and referenced Amtrak's letters in January and April, to which there had been no response. App. A-9; JA 702-703. Shiplett said that he was only interested in working as an engineer, in exchange for which he would drop any discrimination charges against Amtrak. App. A-9; JA 702-703.

At trial, Shiplett claimed that he had orally asked Dr. McLean "sometime after September 27, 1994" whether "he [would] consider letting me work as a conductor or an assistant conductor." JA 503-504, 561-562. Dr. McLean had no recollection of any such request and there is nothing anywhere documenting or corroborating this alleged request. App. A-20 -- A-21; JA 703, 714-715. Nor did Shiplett contend at trial that he ever again raised this option with the medical director or anyone else. Moreover, Shiplett offered no evidence at trial to

suggest that there were any conductor or assistant conductor positions available to someone with his union seniority. Finally, Shiplett conceded the safety-sensitive nature of a conductor's position, acknowledging that the conductor must supervise coach cars and, in case of emergency, evacuate passengers from the train. App. A-21; JA 561.

Dr. McLean testified at trial that following a major accident in late 1992, he had given sworn testimony before the National Transportation Safety Board ("NTSB") that the railroad did *not* permit engineers to operate trains while on Xanax. App. A-9. The NTSB thereafter specifically recommended that Amtrak develop programs "to ensure that the individuals [engineers] will not take drugs, such as benzodiazepines and barbiturates." App. A-9; JA 93, 97, 251-253, 639-640. Dr. McLean also testified that in early 1995, an NTSB toxicologist, who apparently had learned about the Shiplett matter, called the medical director to reiterate the NTSB's position that Amtrak should not permit engineers to use Xanax. App. A-9; JA 709-711.

In addition, the Federal Railroad Administration ("FRA") conducted an investigation into the Shiplett matter in response to a Congressional request. App. A-9. The FRA then issued a December 30, 1994 letter concluding that Dr. McLean's actions were consistent with 49 CFR Part 219.103, which, the FRA advised, "requires medical officers to ensure that medications used by employees are consistent with the safe operation of an employee's duties." App. A-9 -- A-10; JA 93-94, 131, 668-670.

In addition, the Equal Employment Opportunity Commission ("EEOC") investigated Shiplett's discrimination charges and found no reasonable basis for the charges. App. A-10; JA 93, 96, 162, 536.

At trial, petitioner offered testimony from two private medical physicians, one of whom was Dr. Matossian. JA 354-355, 381. Neither had any background in transportation or public safety. JA 366, 406. Although they opined that there was no medical need to prevent petitioner from resuming his engineer's job due to Shiplett's use of Xanax, neither doctor disputed the side-effects of the drug; Dr. Matossian admitted an engineer should not operate a train if he is drowsy; neither doctor challenged the connection between Shiplett's significant operational error on September 15 and his use of Xanax; neither doctor contended that Shiplett was medically required to use Xanax, rather than some other prescribed medication; Dr. Matossian admitted that any opinion he had about Dr. McLean's conduct "would depend [on] what Dr. McLean's function was" and conceded that Amtrak's medical director had "referred to [Amtrak's] policy, transportation and safety rules that *really I know nothing about* [emphasis added]." JA 388, 407, 410-412, 421.

In addition, neither of petitioner's medical experts suggested that Shiplett's emotional problems were due to Shiplett's alleged decision to immediately cease all use of Xanax in response to Dr. McLean's purported directive on September 20, 1994. On the contrary, one of Shiplett's doctor's attributed his emotional breakdown to his "rage" over the perceived "injustice" of his having been prevented by Amtrak from resuming work with the railroad. JA 360, 362-363, 368, 370-375.

REASONS FOR DENYING THE WRIT

A. <u>There is No Ground for Reviewing the ADA Claim</u>

The Sixth Circuit's decision does not, as petitioner argues, conflict with this Court's decision in *Bragdon* by

purportedly deferring to the opinion of a private health care professional. Pet. 9-14. Quite the contrary, the Sixth Circuit deferred to the unanimous judgments of Dr. McLean, the NTSB and the FRA because they were collectively "charged with [responsibility for] transportation safety." App. A-20.

The evidence unambiguously demonstrates that before Shiplett's station overshoot the NTSB had recommended, and Dr. McLean had decided, that Amtrak's engineers would not be permitted to use drugs like Xanax. App. A-8. Moreover, when the FRA later investigated the Shiplett incident, it specifically concluded that Dr. McLean's actions had been consistent with his authority under a regulation promulgated by the FRA to address the safety issue of alcohol and drug use, 49 CFR § 219.103. App. A-8. Under 49 CFR § 219.103, even when a private treating medical practitioner notifies the railroad of his or her good faith judgment that a railroad employee's use of a prescribed drug is consistent with the safe performance of his duties, that notification "does not restrict any discretion available to the railroad to require that employees . . . obtain prior approval for such use." *See*, 49 CFR § 219.103.

Section 219.103(c) should be read in conjunction with related FRA regulations on this subject, including 49 CFR § 219.101(a) (prohibiting an employee from working while "under the influence of or impaired by any controlled substance"), 49 CFR § 219.101(c) (authorizing a railroad to impose an "absolute prohibition on the presence of . . . any drug in the body fluids of persons in its employ"), 49 CFR § 219.102 (directing that "no employee . . . may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103"), and 49 CFR § 219.105(b) (directing that a "railroad must exercise due diligence to assure compliance with § 219.101 and § 219.102 by each covered employee"). Together, these FRA promulgated regulations reveal that

Amtrak's medical director not only had regulatory discretion to withhold approval for Shiplett to resume work as an engineer while taking Xanax, Dr. McLean had a public duty under the federal regulations to assure that an employee would *not* be permitted to report for work while "under the influence of or impaired by" this highly-addictive prescription drug. Given Shiplett's troubling conduct on September 15, 1994, and Dr. McLean's conclusion that the significant operational error was potentially linked to Shiplett's use of Xanax, Amtrak's medical director could hardly have made any rational decision other than the one he did -- to keep Shiplett temporarily out of service until he could return to work without Xanax in his system.

Not only does petitioner wrongly assert that the Sixth Circuit's decision conflicts with *Bragdon*, Shiplett ignores the relevance of this Court's even more recent decision in *Albertsons, Inc.*, 119 S.Ct. at 2169-70 & n.13 (1999). In *Albertsons*, this Court held that an employer may require an employee to satisfy a job function requirement that is contained in a federal regulation without violating the ADA. *See also, Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 628-29 (7th Cir. 1998). *Albertsons* demonstrates that the ADA does not require employers to act with blinders on; they may be guided by applicable federal regulations in determining whether an employee is qualified to perform essential job functions. *Bragdon*'s instruction that courts should not defer to the medical views of a private practitioner has nothing to do with *this* case, which concerns the railroad's duty and authority under federal regulations to decide whether to approve an employee's use of a highly-addictive prescription drug.

Moreover, the decision below is, if anything, in harmony with *Bragdon*'s instruction that the views of *public* health officials are entitled to "special weight and authority" in assessing whether an ADA complainant poses a direct threat to

safety. *Bragdon*, 118 S.Ct. at 2211. *See also*, *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999). This is not, as petitioner suggests, a case in which the court below relied on the opinion of a *private* health provider. On the contrary, the Sixth Circuit deferred to the collective judgments of *public* entities -- the FRA and NTSB -- that were acting pursuant to their responsibilities to advance *public* safety, and a medical officer charged with discretionary responsibilities under FRA-promulgated regulations.

In addition, petitioner ignores the fact that the Sixth Circuit held, *in the alternative*, that Amtrak had presented a legitimate, non-pretextual reason for temporarily precluding plaintiff from his employment as a locomotive engineer, one which Shiplett *never* rebutted with probative evidence. App. A-22, n.2. Even when a plaintiff presents a prima facie case of discrimination, he still bears the burden of showing that the employer's legitimate explanation for its actions amounted to a pretext for discrimination. *See*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). *See, e.g.*, *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 15 (1st Cir. 1998); *Sheridan v. E.I. duPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996)(en banc), *cert. denied*, 521 U.S. 1129 (1997). Here, the opinions of petitioner's private practitioners – that Xanax could be taken safely by Shiplett – did not remotely undercut Amtrak's good faith explanation for why it was not prepared to take a chance with the safety of Amtrak's passengers. Circuit courts have repeatedly denied a plaintiff's claim of discrimination under the ADA based on safety-related concerns similar to those presented here. *See*, *Hill v. Kansas City Area Transp. Authority*, 181 F.3d 891 (8th Cir. 1999) (discharged bus driver had fallen asleep potentially due to blood pressure medications); *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998) (police recruit had suffered two diabetic episodes that could have been avoided medically); *E.E.O.C. v. Amego,*

Inc., 110 F.3d 135 (1st Cir. 1997) (employee with diagnosed depression discharged from organization that cares for severely disabled people); *Siefken v. Village of Arlington Heights*, 65 F.3d 664 (7th Cir. 1995) (police officer with diabetes terminated after suffering diabetic reaction on duty); *see also*, *Baert*, 149 F.3d at 628-629 (insulin dependent truck driver conceded on appeal that law prohibits him from holding commercial license).

The irrefutable evidence fully supports Amtrak's non–pretextual explanation for its conduct. Moreover, petitioner offered no expert testimony to refute that Xanax may have been a cause of Shiplett's serious operational error. Petitioner's experts did not purport to be experts in railway safety. Petitioner's experts never once suggested that Xanax was the only drug Shiplett could safely take. Amtrak thus had ample basis for keeping Shiplett temporarily out of service until he stopped using Xanax. His own physician then prescribed a new regimen of drugs that left Shiplett feeling better than ever. Yet, petitioner proceeded to fail the next drug test and thereafter failed to or refused to comply with the options with which he was presented based on company policy. There is, in short, no reason for this Court to conduct the same thorough record review undertaken by the Sixth Circuit, which concluded that Shiplett had failed to offer evidence that Amtrak's reason for keeping Shiplett out of service was pretextual. App. A-22 n.2.

Petitioner's second ADA argument – that the Sixth Circuit improperly failed to base its decision on an "individualized assessment" of Shiplett's condition (*see* Pet. 14-18) – can be disposed of in short order. First, this Court has indicated that individualized assessments are *not* always required. *See, Albertsons, Inc.*, 119 S.Ct. 2162, 2171 (no individualized assessment required when applicable federal regulations "contain no qualifying language about

individualized determinations"); *Traynor v. Turnage*, 485 U.S. 535, 550 & n. 11 (1988)(instructing that decision in *School Board of Nassau v. Arline*, 480 U.S. 273 (1987) simply "recognized that the district courts should 'in most cases' undertake an individualized inquiry"). *Albertsons* demonstrates that an individualized assessment is *not* required where the employer properly relies on a federal regulation. *Albertsons*, 119 S.Ct. at 2171. In this case, Amtrak had discretion to decide under federal regulations that *no one* in a safety-sensitive job would be allowed to use Xanax, and as the FRA's investigation confirmed, Amtrak's judgment in this respect was consistent with federal regulations. Second, as noted earlier, even if Shiplett were "otherwised qualified" based on an "individualized assessment" petitioner failed to offer evidence to rebut Amtrak's non-pretextual justification for its decision. App. A-22, n.2.

Finally, contrary to petitioner's claim (Pet. 18-23), the Sixth Circuit applied the proper burden of proof concerning Amtrak's duty to offer a reasonable accommodation under the ADA. Petitioner must demonstrate that he is qualified to perform any job for which an accommodation is sought. 42 U.S.C. §§ 12111(8), 12111(9) 12112(b)(5)(B). *see, e.g.*, *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 316-317 (3rd Cir. 1999). The record clearly reveals Shiplett failed to satisfy this fundamental ADA requirement.

As the Sixth Circuit noted, plaintiff's alleged oral request that he be permitted to work as a conductor also involved a job that is safety-sensitive. App. A-20-A-21. Thus, for the same reason that Amtrak was entitled to prevent Shiplett from resuming work until he had stopped using Xanax, the Sixth Circuit properly concluded that Amtrak was entitled to

keep him from assuming the safety-sensitive position of conductor until he was free of this highly-addictive drug. Id.

In addition, petitioner is mistaken in asserting that the Seventh Circuit supports his contention that a plaintiff can recover under the ADA even if he cannot identify a vacant position for which he is qualified. *See*, Pet. 19-20, *citing*, *Hendricks-Robinson*, 154 F.3d 685 (7th Cir. 1998) and *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483, 486-487 (7th Cir. 1997). Shiplett ignores other recent Seventh Circuit court decisions directly holding that a plaintiff must identify a vacancy for which he seeks to be accommodated. *See*, *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 595 (7th Cir. 1999); *McCreary v. Libbey-Owens-Ford Co.*, 132 F.3d 1159, 1164 (7th Cir. 1997) *rehearing denied* (Feb. 6, 1998). Similarly, contrary to plaintiff's assertion, there is no confusion in the Ninth Circuit with respect to an employee's burden to demonstrate the existence of a vacant position. *See*, Pet. 21. *Mustafa v. Clark County School Dist.*, 157 F.3d 1169, 1176 (9th Cir. 1998) is not at odds with *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 749 (9th Cir. 1998), in which the Ninth Circuit specifically determined that the plaintiff bears the initial burden of showing the existence of a position for which he seeks an accommodation.

Just as important, petitioner overstates the legal significance of the cases he cites in which various circuit courts describe an employer's duty to engage in an interactive process. Decisions such as *Fjellstad v. Pizza Hut of America, Inc.*, 188 F.3d 944 (8th Cir. 1999) and *Taylor v. Phoenixville School Dist.*, 184 F.3d 296 (3rd Cir. 1999) declined to uphold summary judgment for the employer based on evidence that an employer had failed to make a good faith attempt to engage in the interactive process. But they clearly also instruct that at trial the plaintiff still retains the burden of showing that he was

qualified to hold a particular position for which he claims the right to a "reasonable accommodation." *Fjellstad*, 188 F.3d at 954 and 957 (employee still carries the burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the essential functions of the job and he retains this burden "at all times"); *Taylor*, 184 F.3d at 317 ("nor does [the interactive process] remove the employee's burden of showing that a particular accommodation rejected by the employer would have made the employee qualified to perform the job's essential functions"). Thus, to prevail at trial plaintiff must show that he could have been successfully accommodated *but for the* employer's bad faith. *Taylor*, 184 F.3d at 319-320. This means that a plaintiff still must show at trial that there was a vacancy for which he was qualified because otherwise the employer's alleged bad faith refusal to engage in the "interactive process" would have made no difference. None of the cases petitioner cites can properly be read to support the draconian proposition that evidence of an employer's failure to engage in interactive process is enough to justify an award for plaintiff even when there is no evidence that the process would have been fruitful.

Petitioner offered testimony of a single alleged oral request about the possibility of a conductor's position. There is no hint he ever mentioned it again. Nor is there any evidence that even if Amtrak had pursued this option, a conductor's position would have been available, given petitioner's seniority. Since there is no disputing that a plaintiff always bears the burden of proof, the Sixth Circuit's rejection of Shiplett's reasonable accommodation claim is entirely consistent with applicable legal principles. There is no "confusion" or "conflict" in the circuits meriting review by this Court.

B. There Is No Ground For Reviewing the FELA Emotional Distress Claim

Petitioner's asserted ground for reviewing the Sixth Circuit's rejection of his emotional distress claim under the FELA is meritless. *See*, Pet. 23-26. The crux of petitioner's FELA claim below was not for physical injuries. It was for his complete emotional breakdown. *See*, JA 781-783, 785-788, 792. According to one of his expert witnesses, this breakdown was the result of Shiplett's "rage" over the "injustice" of the fact that Amtrak had "stopped [him] from working" with the railroad. JA 360, 362-363, 368, 370-375. No expert testimony was offered to show that this breakdown was caused, in any way, by the fact that he allegedly had stopped taking Xanax "immediately" based on the purported advice of Dr. McLean.

On this record, the Sixth Circuit quite properly analyzed Shiplett's FELA claim as one for negligent infliction of emotional distress, which meant that it was subject to analysis under the "zone of danger" test articulated by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *See also, Metro-North Commuter R. Co. v. Buckley*, 117 S.Ct. 2113 (1997). The record is devoid of evidence that petitioner's emotional breakdown was due to an imminent fear of physical impact, or the result of any physical injury he suffered for that matter. *See* App. A-26 -- 27.

In establishing the "zone of danger" test, this Court in *Gottshall* warned of the need to protect against frivolous or fraudulent emotional distress claims and the specter of unlimited liability. *Gottshall*, 512 U.S. at 557. *See, Buckley*, 117 S.Ct. at 2119. Under any reasonable application of *Gottshall*, plaintiff's evidence fell woefully short of satisfying the "zone of danger" test applicable to petitioner's emotional distress claim.

C. Summary

The Supreme Court of the United States does "not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227, (1925) (Holmes, J.). The "Court's review ... is discretionary and depends on numerous factors other than the perceived correctness of the judgment [the Court is] asked to review.'" *Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U.S. 445, 460, 105 S.Ct. 2768, 2776 (1985) (Stevens, J., concurring in part and dissenting in part), *quoting Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). *See also, General Talking Pictures v. Western Electric Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it").

Petitioner professes to find important legal issues and a conflict among the circuits in a Sixth Circuit Order that thoroughly reviews the record evidence and concludes -- quite correctly -- that petitioner failed to adduce sufficient probative evidence to support his claims. The petitioner's argument "cannot obscure the truth that [what] is involved [in this case] is an appraisal of the fair inferences to be drawn from the evidence." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 455-456 (1959) (Frankfurter, J., dissenting).

CONCLUSION

For all of the foregoing reasons, the petition for issuance of a writ of certiorari should be denied in its entirety.

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Respectfully submitted,

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